Supreme Court, U.S.
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No. 97-231

In The

Supreme Court of the United States

October Term, 1997

MARY ALMAND,

Petitioner,

vs.

DEKALB COUNTY, GEORGIA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented by Petitioner are as follows:

1. Must a court's determination of whether an action was taken under color of state law be made in light of the totality of the circumstances.

2. Is the question of whether an action was taken under color of state law always a pure question of law or can it be a mixed question of law and fact.

3. Whether a defendant's admission in his answer that he acted under color of state law is binding.

Respondent Floyd Bryant[1] contends that this case is not a proper one for a grant of certiorari. In the event the Court does grant the Petition, Respondent contends that the only issues that ought to be addressed are the second and third ones presented by Petitioner. With regard to question one, it is clear upon a careful reading of the Eleventh Circuit's opinion in this case that they did consider the "totality of the circumstances" and simply drew a conclusion contrary to the position of the Petitioner. Therefore, that question is not a proper one for a writ of certiorari.

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[1] Although DeKalb County, Georgia is shown in the style of this case, Floyd Bryant was the only Appellant below and is the only Respondent in this Court.

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OPINIONS AND JUDGMENT BELOW

Petitioner attached to the Petition the opinions and judgment from below. The opinion of the United States Court of Appeals for the Eleventh Circuit dated January 24, 1997, reported at 103 F.3d 1510 (11th Cir. 1997); the Order of the United States District Court for the Northern District of Georgia, Atlanta Division filed May 30, 1995; and the Per Curiam Opinion of the United States Court of Appeals for the Eleventh Circuit Denying Petition For Rehearing Filed May 7, 1997 are attached to the Petition as Appendices A, B and C respectively. Respondent has not made these exhibits to this Response.

STATEMENT OF JURISDICTION

Respondent agrees that the jurisdiction of this Court would be proper under 28 U.S.C § 1254(1) but denies that this is a proper case for a grant of a writ of certiorari.

STATUTE INVOLVED

Respondent agrees that this case involves the application of 42 U.S.C. § 1983.

STATEMENT OF THE CASE

With one glaring, and perhaps dispositive, exception, Petitioner's factual statement is drawn substantially, and in parts verbatim, from the facts set forth by the Court of

Appeals. Moreover, in her Suggestion Of En Banc Hearing And Petition For Rehearing By Plaintiff-Appellee-Petitioner, Petitioner's Statement of Facts consisted solely of the following: "The facts of this appeal are simple and correctly stated in the panel's opinion at slip op., pp. 736-738."

The change Petitioner seeks to make in the facts she presents to this Court appears at the end of the third paragraph on page 3 of the Petition. Petitioner states:

> [B]ryant initially went out the door, but before Almand could retrieve the key and relock the door Bryant reentered the apartment. Upon reentering the apartment, Bryant struggled with and raped Almand.

Petition, p. 3.

However, the pertinent facts established by the record, set forth by Petitioner in the briefs below, and stated by the Court of Appeals, which restatement was adopted by Petitioner in seeking an en banc rehearing, are as follows:

> [A]lmand asked Bryant to leave; and although he declined at first, he eventually agreed to leave. Bryant went out the door, and Almand closed it behind him.
>
> From outside, Bryant then forced open the closed door with such shock that the wood broke off the door. Having pushed open the door, Bryant reentered Almand's apartment, physically struggled with her and forcibly raped her. No report was made to the police at the time.

> A few days later, Almand was arrested for drug trafficking . . .

Petition, p. 4a. During her deposition Petitioner affirmed that the door was completely closed.

Petitioner, as she is entitled to do on a Motion for Summary Judgment, related her version of the incident in a manner which shows Respondent to be the perpetrator of a vicious attack. Now that the Court of Appeals has held that the legal effect of her very facts is that the allegedly wrongful act of Respondent against Petitioner was not under color of law, Petitioner attempts to recast the facts before this Court.

Petitioner notes that the Court of Appeals' opinion was a "split decision" but fails to note that the dispositive issue for a dissenting senior district judge sitting by designation was that the door, although "fully closed," was not locked. *Compare* Petition, p. 10a *with* Petition, p. 15a. The facts as cast by Petitioner and accepted by the Court of Appeals and then adopted by the Petitioner in her request for en banc rehearing, state that Respondent broke through a closed door. Whether the door in addition to being closed was locked makes no difference to the Court of Appeals' holding.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

Petitioner has failed to cite any authority from this Court that the Court of Appeals ignored or misapplied,

has failed to identify a true conflict among or between the circuits,[2] and has failed to articulate an important federal question requiring this Court's attention. Therefore, Petitioner has failed to demonstrate why the Court should grant a writ of certiorari in this case. Sup. Ct. R. 10(a), (c).

As noted above, Petitioner is seeking certiorari based upon a different set of facts in the hope of getting a different result. She is attempting to argue the case again after recasting the facts which were considered by the Court below.

ARGUMENT

I.

THE COURT OF APPEALS DID CONSIDER THE TOTALITY OF THE CIRCUMSTANCES IN CONCLUDING THAT THE RESPONDENT'S ALLEGED ACTIONS WERE NOT TAKEN UNDER COLOR OF STATE LAW.

A person acts under color of state law when he acts with authority possessed by virtue of his employment with the state. *Edwards v. Wallace Community College*, 49 F.3d 1517, 1522 (11th Cir. 1995) (citing *West v. Atkins*, 487 U.S. 42, 48-50, 108 S.Ct 2250, 2255, 101 L.Ed.2d 40 (1988)). However, not all acts by state employees are acts under color of law. *Id.* at 1523. "The dispositive issue is whether the official was acting pursuant to the power he/she possessed by state authority or acting only as a private

[2] Merely pointing to cases from other circuits which reach different results on different facts does not identify a circuit conflict.

individual." *Id.* (citing *Monroe v. Pape*, 365 U.S. 167, 183-84, 81 S.Ct. 473, 482, 5 L.Ed.2d 492 (1961), *overruled on other grounds by, Monell v. Department of Social Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)).

Whether conduct constitutes state action is no simple question of fact. *See Blum v. Yaretsky*, 457 U.S. 991, 996-98, 102 S.Ct. 2777, 2782, 73 L.Ed.2d 534 (1982) (describing the question of whether there is state action as question of law); *Cuyler v. Sullivan*, 446 U.S. 335, 342 n.6, 100 S.Ct. 1708, 1715 n.6, 64 L.Ed.2d 333 (1980) (determining if state action exists is resolution of question of law); *see also, Duke v. Smith*, 13 F.3d 388, 392 (11th Cir. 1994) (reviewing *de novo*, as a mixed question of law and fact, district court's determination that private actor was not sufficiently intertwined with governmental entity to be engaged in state action).

Petitioner argues that the Court of Appeals "erred in attempting to establish a bright line test for determining when action is taken under color of state law." Petition, p. 6. Petitioner's characterization of the Court of Appeals' holding is misleading at best. The opinion of the Court of Appeals contains over two pages of facts, and in its discussion of its holding, the Court discusses the facts again for more than a page.[3] In addition, the Court noted

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[3] Once again the facts found by the Court of Appeals were those urged upon the Court of Appeals by the Appellee/Petitioner. The Court of Appeals, as required, considered the facts in the manner most favorable to the non-movant Plaintiff/Appellee/Petitioner. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-55, 106 S.Ct. 2505, 2513-14, 91 L.Ed.2d 202 (1986). Plainly stated, the "new" totality of the circumstances Petitioner asks

facts that were not material and those that, if different, would change the result. Petition, pp. 2a-4a, 9a-11a, & nn.9-11. Clearly, the Court of Appeals considered the totality of the circumstances in reaching its result.

Petitioner misstates the Court's holding in stating that the Court of Appeals developed a "bright line test." To the contrary, the Court merely stated that in reaching its conclusion, the Court is required "to engage in line drawing." Such language is common when addressing legal questions even if the standard is one of totality of the circumstances. *See, e.g., Faragher v. City of Boca Raton*, 111 F.3d 1530, 1538-39 (11th Cir. 1997) (noting that standard in hostile work environment case is "totality of the circumstances" but discussing where "to draw the line"); *United States v. Saintil*, 753 F.3d 984-989 (11th Cir. 1985) (holding "[w]hile it sometimes difficult to draw lines as to the admissibility of evidence under Rule 403, we cannot say it was an abuse of discretion, under the totality of the circumstances presented here, to admit this evidence for the purpose of proving control over the vessel."); *Elliott by and through Elliott v. United States*, 13 F.3d 1555 (11th Cir. 1994) (addressing the doctrine of *Feres v. United States*, 340 U.S. 135 (1950)).

Moreover, typically when a court establishes a "bright line" test, it refers to it as such. Importantly, the words "bright line" are the language of the Petitioner, and those words are absent from the Court of Appeals'

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this Court to consider are circumstances other than those she urged upon each court below, in the hope of obtaining a different result.

opinion in this case. Finally, in restating its holding, the Court wrote:

> [I]n the *circumstances* of this case, we draw the line at the front door of Almand's apartment. When Bryant, by physical force, broke into Almand's residence, he was not then gaining entry by virtue of any authority he might have been given by the state to act as a police officer.

Petition p. 11a (emphasis supplied). The emphasized word makes clear that the Court of Appeals considered the totality of the circumstances, and then drew a line – or in other words, a conclusion. The Court of Appeals was not articulating a new "bright line" test.

Without additional discussion of the appropriate standard, Petitioner puts forth cases from other circuits which she asserts require a different result in this case. The cases relied upon by Petitioner are distinguishable from the instant case. As noted previously, for the Court of Appeals below, the critical factor seemed to be that Respondent allegedly came through Petitioner's door by brute force rather than by virtue of his office of police officer. Even the dissenting Senior District Judge wrote:

> [T]he majority holds that once Bryant left and then "forcibly" broke in, he was no different than "any other ruffian." If Bryant had broken through a *locked* door, I might accept this conclusion.

Petitioner, p. 15a (emphasis supplied).

Petitioner relies on *Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476 (9th Cir. 1991). This case is readily distinguishable from the case at bar. The accused official in *Dang Vang* consistently took advantage of the victims by virtue of the trust they placed in him as an officer of the state. There was no indication that he ever gained access to them or put them in the position to assault them by brute force. Certainly there is no indication that he ever broke through a closed door to get to one of them, after having been completely excluded from their apartment.

The next case relied upon by Petitioner is *Doe v. Rains County Independent School District*, 76 F.3d 666 (5th Cir. 1995). In *Doe*, unlike in this case, the teacher had an ongoing sexual relationship with the student which had arisen, at least in part, during school hours. Again, *Doe* lacks any indication that the alleged state officer ever stepped outside his position as a teacher to gain access to the alleged victim. The critical distinction for the Court of Appeals' opinion below is that Respondent obtained access to Petitioner by breaking through a closed door, and not by seducing her while otherwise engaged in police work.

The final case relied upon by Petitioner, *Bennett v. Pippin*, 74 F.3d 578 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 68 (1996), illustrates the importance of Petitioner's attempted recharacterization of the facts of this case. In that case, the Sheriff apparently gained access to the victim by walking into her house after offering to stay on her porch to stand guard. Petitioner argues that *Bennett* is similar to this case because the Sheriff apparently

"entered the victim's home without her consent." Petitioner then argues that the Court of Appeals was "misguided" in placing emphasis on the "lone fact" that Respondent reentered Petitioner's apartment by force.

Again Petitioner misreads the Court of Appeals' opinion. In its discussion of this issue, the Court of Appeals stresses the fact that Respondent made advances towards Petitioner and she demanded that he leave and that he complied with that request. The Court then notes that Almand had fully closed the door, thus excluding Respondent from her apartment. Respondent then allegedly burst in the front door, and at that point committed the sexual assault. Therefore, the Court of Appeals was relying not on the force alone, but on the fact of the forcible reentry after Petitioner had fully excluded him from her apartment. Importantly, the dissenting Judge would have agreed with the majority's analysis if the door had been locked.

Petitioner's attempted reliance on the dissenting opinion shows a misunderstanding of this Court's purpose. Essentially, Petitioner requests that this Court grant certiorari and send this case back for the purpose of determining whether or not the unlocked door is critical. Petitioner wanted to characterize Respondent's actions as violently as possible, and in so doing, rendered the fact of whether or not the door was locked ultimately immaterial to the Court of Appeals' analysis.

II.

THE ISSUE OF WHETHER AN ACTION WAS TAKEN UNDER COLOR OF STATE LAW IS A QUESTION OF LAW, OR IN THE ALTERNATIVE, EVEN IF IT IS A MIXED QUESTION OF LAW AND FACT, IT IS ONE THAT IS PROPER FOR THE COURT TO RESOLVE.

Put simply, statements from this Court indicate that the color of law question is a question of law for the Court's determination. *Blum v. Yaretsky*, 457 U.S. 991, 996-98, 102 S.Ct. 2777, 2782, 73 L.Ed.2d 534 (1982); *Cuyler v. Sullivan*, 446 U.S. 335, 342 n.6, 100 S.Ct. 1708, 1715 n.6, 64 L.Ed.2d 333 (1980).

Moreover, even if the color of law issue is a mixed question of law and fact, it is a question like probable cause, or arguable probable cause, which are proper for a court to determine. Importantly, the Court of Appeals made its determination based upon the facts as presented by the Petitioner. Petitioner has not pointed to any factual dispute which would change the Court of Appeals' holding. As noted above, Petitioner simply does not like the result the Court of Appeals reached. As a result, this case as presented by Petitioner, is not a proper one for the grant of a writ of certiorari. United States Supreme Court Rule 10 concludes:

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Finally, Petitioner argues that the Court of Appeals below ignored its own case law. *See Duke v. Smith*, 13 F.3d 388 (11th Cir. 1994). In *Duke*, the Court reviewed a district court finding regarding state action "*de novo* because the

issue of state action is a mixed question of law and fact." *Id.* at 392.

Importantly, the United States Supreme Court does not exist to correct a Court of Appeals' application of its own precedent. Moreover, in *Duke*, the Court of Appeals reviewed the color of law question *de novo*, and not for clear error. This indicates that the issue is one for the court as an expounder of the law, and not as a fact finder, to resolve. Clearly, as illustrated by its lengthy discussion of the facts, the Court of Appeals below correctly resolved the color of law issue in light of the facts presented.

III.

RESPONDENT'S STATEMENT IN HIS ANSWER THAT HE WAS "A POLICE OFFICER WHOSE CONDUCT DESCRIBED HEREIN WAS TAKEN UNDER COLOR OF STATE LAW" IS NOT DISPOSITIVE OF THE COLOR OF LAW ISSUE.

Respondent in his answer stated "this Defendant admits the allegations" of a paragraph of the Complaint which read:

> Defendant, FLOYD RICHARD BRYANT, was at all times herein a law enforcement officer certified by the State of Georgia and employed by the County of DeKalb, Georgia, as a police officer whose conduct described herein was taken under color of law.

Petitioner argues that Federal Rule of Civil Procedure 8(b) mandates that Respondent's answer to this allegation is dispositive of the color of law issue. In presenting this

issue to this Court, Petitioner departs even further from the purposes for which certiorari is ordinarily granted. Petitioner does not even argue that this simple rule of pleading governing procedure in the district courts presents an "important federal question"; that the Court of Appeals' decision departed from the accepted and usual course of judicial proceedings calling for an exercise of this Court's supervisory power; that the meaning of Civil Procedure Rule 8 is an important question of federal law requiring interpretation by this Court; or that it is an important federal question decided in a way conflicting with previous decisions of this Court.

More importantly, Petitioner again ignores the analysis of the Court of Appeals. The Court of Appeals, in reaching its decision, noted that in the context of all of the pleadings, it was clear that Respondent was denying that he had taken any wrongful action under color of law. Respondent specifically denied that he was even present at Petitioner's residence on the pertinent date; that he broke her door; or that he raped her. Respondent also stated in his answer that the Complaint did not state a cause of action under federal law. In the end, the Court of Appeals concluded that, construed in its totality, Respondent's answer meant that the actions he admitted to taking were taken under color of state law, but that the relevant allegations regarding his wrongful conduct were not taken under color of state law. Petition, p. 9a. Finally, the Court of Appeals noted that in support of his Motion for Summary Judgment, Respondent stated that "no action by him was taken under color of state law, for purposes of § 1983 liability."

Petitioner is forced to rely on "substantial justice" and Federal Rule of Civil Procedure 8(f) to argue that this Court should grant the writ of certiorari and hold (given the purposes for which this Court accepts a case) that each time a defendant in any district court in this country admits a general allegation and only denies the wrongful conduct which would give rise to such a § 1983 liability, such defendant must be bound by such an "admission." Respondent suggests that not only is this an improper issue upon which to grant a writ of certiorari, a decision in Petitioner's favor would create numerous problems and complicate the pleading process in the district courts. *See* Fed. R. Civ. P. 1.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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